83-160

IN THE

SUPREME COURT OF THE UNITED STATES

No.

BETTY T. KRALL,

Petitioner

vs.

BETHEL PARK SCHOOL DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF PENNSYLVANIA

JOSEPH M. LUDWIG
LUDWIG & ACHMAN
Attorneys for Petitioner
312 Frick Building
Pittsburgh, PA 15219
(412) 232-3500

QUESTIONS PRESENTED

1. May each school board in the State of Pennsylvania determine what "immorality" is without offending constitutional guarantees of equal protection and due process? Does a rule of "no law" by a state offend the Constitution?

2. Is the term "immorality" so nebulous to be without meaning?

3. May an administrative decision of the Secretary of Education as a matter of law be reversed by Commonwealth Court (an appellate court) as a question of fact? Does the Secretary's decision have any "legal significance"?

4. May the Commonwealth Court pose the issue as one of law and decide the matter as one of fact? E.g., "Thus the issue here is whether Mrs. Krall's conduct constituted

immorality as a matter of law"...and...". the determination of community standards is made by the school board, and thus a finding of the board that a professional employee as guilty of offending the moral standards of the community by his actions will not be disturbed on appeal when supported by substantial evidence. Emphasis ours. Opinion at 2 and 3.

5. Does a single isolated incident rise to a "course of conduct" under the Public School Code thus justifying termination of employment?

6. Is a single act of prevarication so inimical to the welfare of the school community so as to justify termination of employment?

7. Does a teacher have the right to present evidence of discrimination and prejudice on the part of the school board?

8. May the school board terminate a teacher's employment for doing what it permits other teachers in the school district to do?

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

BETTY T. KRALL,

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vs.

BETHEL PARK SCHOOL DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
PENNSYLVANIA

The Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on the 19th day of April, 1983 and the Orders of the Commonwealth Court of Pennsylvania dated July 28, 1982 and June 8, 1982.

OPINIONS BELOW

The Bethel Park School District dismissed Bette T. Krall, a professional employee, for conduct which it considered immoral under Section 1122 of the Public School Code. The Secretary of Education sustained the appeal of Bette T. Krall and ordered her reinstated. The Bethel Park School District appealed that order to the Commonwealth Court, which on June 8, 1982, reversed the Secretary of Education and sustained the Order of the School District. The Commonwealth Court denied reargument on July 28, 1982. The Supreme Court of Pennsylvania denied a Petition for Allowance of Appeal on April 19, 1983 and this Petition followed. A copy of the Opinion and Orders are attached hereto as Appendix A, B and C.

JURISDICTION

Jurisdiction is conferred upon this Court to review the judgment of state courts

by writ of certiorari through the United States Code, Title 28, §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. May each school board in the state of Pennsylvania determine what "immorality" is without offending constitutitional guarantees of equal protection and due process? Does a rule of "no law" by a state offend the Constitution?

2. Is the term "immorality" so nebulous to be without meaning?

3. May an administrative decision of the Secretary of Education as a matter of law be reversed by Commonwealth Court (an appellate court) as a question of fact? Does the Secretary's decision have any "legal significance"?

4. May the Commonwealth Court pose the issue as one of law and decide the matter as one of fact? E.g.,"Thus the issue here is whether Mrs. Krall's conduct constituted immorality as a matter of law"...and..." The

determination of community standards is made by the school board, and thus a finding of the board that a professional employee was guilty of offending the moral standards of the community by his actions will not be disturbed on appeal when supported by substantial evidence. Emphasis ours. Opinion at 2 and 3.

5. Does a single isolated incident rise to a "course of conduct" under the Public School Code thus justifying termination of employment?

6. Is a single act of prevarication so inimical to the welfare of the school community so as to justify termination of employment?

7. Does a teacher have the right to present evidence of discrimination and prejudice on the part of the school board?

8. May the school board terminate a teacher's employment for doing what it permits other teachers in the school district to do.

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States provides as follows:

> ARTICLE (XIV). Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persoin of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

The following statutes are involved:

11.1122. Causes for termination of contract.

The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employe shall be immorality, incompetency, intemperance, cruelty, persistent negligence, mental derangement, advocation of or participating in un-American or subversive doctrines, persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employe: Provided, that boards of school directors may terminate the service of any professional employe who has attained to the age of sixty-two except a professional employe who is a member of the old age and survivors insurance system pursuant to the provisions of the act, approved the first day of June, one thousand nine hundred fifty-six

(Pamphlet Laws 1973). In such case the board may terminate the service of any such professional employee at the age of sixty-five or at the age at which the employe becomes eligible to receive full benefits under the Federal Social Security Act.

Nothing within the foregoing enumeration of causes, shall be interpreted to conflict with the retirement of professional employes upon proper evidence of disability, or the election by professional employes to retire during the period of voluntary retirement, or the authority of the board of school directors to require professional employes to retire during said period of voluntary retirement, or the compulsion on the part of professional employes to retire at the attainment of age seventy. 1949,

March 10, P.L. 30, Art. XI, 1122; 1949, May 9, P.L. 939, 4; 1957, June 28, P.O. 395,1; 1961,July 26, P.O. 891, 1.

1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of

Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. §1979; Pub.L.96-170,§1,Dec.29, 1979, 93 Stat.1284.

STATEMENT OF THE CASE

The facts of the incident were stipulated by the parties before the School Board and hence to the Secretary of Education and Commonwealth Court. Mrs. Krall was a tenured professional employee of the district since 1969 and was also an elected director of another school district in which she resided. In the latter capacity Mrs. Krall wished to attend a conference in New Orleans, Louisiana, on February 14 and 15, 1979. Having previously requested and been refused any personal time off to attend conferences, Mrs. Krall did not request personal time off to attend this conference; instead she simply

informed her principal's secretary that she would be unavailable to perform her duties on the subject date.

After attending the conference and returning to work Mrs. Krall submitted a report for excused absence for February 14 and 15, 1979 listing illness as the reason for her absence. Shortly thereafter Mrs. Krall submitted a statement from her physician indicating that she was ill on the subject dates. This statement was based on misrepresented information received from Mrs. Krall's husband without benefit of an actual physical exam. Upon learning of the misrepresentation, Mrs. Krall's physician contacted the school district and retracted his report.

The School Board dismissed Mrs. Krall after a hearing determining that her conduct amounted to "immorality" under the Code. Mrs. Krall appealed her dismissal to the Secretary of Education and a hearing was

held on October 3, 1979. More than two years later, on November 30, 1981, the Secretary of Education sustained Mrs. Krall's appeal concluding as a matter of law that Bette T. Krall's conduct did not amount to "immorality" as a mattter of law. The school district appealed to Commonwealth Court who reversed in favor of the school district and found that the school board decision will not be disturbed when supported by substantial evidence notwithstanding that all facts had been stipulated and there were no credibility questions or facts to find.

Bette T. Krall having prevailed before the Secretary of Education first raised Consitutional issues before the Commonwealth Court of Pennsylvania which was the court of first instance to hear the matter.

REASONS FOR GRANTING THE WRIT

I.

The Petitioner contends that Commonwealth Court's holding that it will not

disturb this school board's determination of community standards when supported by substantial evidence (when all facts are stipulated and there is nothing to find) violates the United States Constitutional guarantees of due process and equal protection. That this is in effect a rule of no law; that it enables and encourages school boards to act arbitrarily and capriciously.

By permitting each school board to determine its definition of what "immoral" means the school board's determination must by definition be void for vagueness. State v. Vallery, 212 La. 1095, 34 So.2d. 329; Lanzetta v. New Jersey, 306 U.S. 451, 83 L.Ed. 888.

To the extent that the law of Pennsylvania leaves it to the absolutely unfettered discretion of a school board, what the punishment will be (reprimand, suspension or discharge), then to that extent the law of

Pennsylvania is unconstitutional. Fisher v. Snyder, 476 F.2d 375 (1973), 28 U.S.C.A. 1343(3,4), 42 U.S.C.A. (1983) It is unconstitutional under the Fourteenth Amendment of the United States Constitution, which provides that no state shall deprive any person of life, liberty or proeprty without due process of law.

II.

Petitioner further contends that constitutional due process has been violated. The teacher had a right to present evidence of discrimination and prejudice on the part of the school board. The Secretary of Education took no additional evidence even though requested by the teacher but we must remember that he found for the teacher. The teacher had a right to show that she was fired for doing what the school administration tolerates or permits other teacher's to do. Yick Wo v. Hopkins, 118 U. S. 356; Lane v. Wilson

307 U. S. 268. If the teacher is entitled to a fair and an impartial hearing, may she prove that the school board was neither fair nor impartial? May she show that the "death knell" had sounded before her hearing and that the school board permitted other teachers to do that for which she was fired. Hanover Twp. Fed. of Teachers, et al. v. Hanover Com. School Corp., et al., 318 F. Supp. 757 (1970).

III.

By correctly stating the issue as a question of law and then deciding it as a question of fact, Commonwealth Court has acted arbitrarily and has departed from the accepted and usual course of judicial decision making so as to call for an exercise of the power of supervision of the Supreme Court. The Secretary of Education's finding was not based on credibility or substantial evidence but was

based on a finding of law which he specifically made as follows:

> "In this opinion we conclude that the teacher's conduct did not amount to immorality as a matter of law. In reaching this determination, we have not re-evaluated the credibility of the witnesses but have accepted the stipulated facts read into the record of the hearing below."

The Commonwealth Court in reviewing the record correctly stated the issue as follows:

> "Thus, the issue here is whether Mrs. Krall's conduct constituted immorality as a matter of law".

The Court erred in never answering the issue that it posed. The Court did so by finding that:

> "community standards are made by the school board and thus a finding of

the board that a professional employee was guilty of offending the moral standards of the community will not be disturbed on appeal when supported by substantial evidence." Opinion at 3.

The Court committed an error in its misapprehension of the nature of substantial evidence. Substantial evidence is defined as "that adduced for the purpose of proving a fact in issue..." Black's Law Dictionary Revised, 4th Edition. There were no facts in dispute; there was no evidence to weigh. All facts were stipulated. The Court erred in defining the issue as one of law and making its determination based on findings of fact, i.e., whether substantial evidence was present. Thus, the Commonwealth Court's determination that community standards have been offended and will not be disturbed when

supported by substantial evidence is a specious argument which never answers the questions of whether the stipulated facts amount to "immorality". It is therefore arbitrary and capricious and deprives this Petitioner of due process under color of law.

IV.

The decision of the Commonwealth Court is inconsistent with decisions of that court on the same question. In the Appeal of Barton Howe, III, Teacher Tenure Act Appeal No. 296, 37 Commonwealth Court 241 (1978) the Appellant, Barton Howe, submitted an absentee slip listing illness as the reason for his inability to work on two days. In fact, the teacher was working in a department store on the two days in question. In reversing the teacher's dismissal on the basis of immorality the Secretary concluded as follows:

> "We believe that the Board has acted in a manner unreasonably harsh in

view of the circumstances. In view of the fact that the Appellant was an 8 year veteran with a record previously above reproach, we find the charges as to immorality excessive and an abuse of Board discretion. A single act of lying is not so inimical to the welfare of the school community that it would necessarily effect student-teacher relationships. In this case there has been no clear nexus estblished between the teacher's act of lying and the Appellant's fitness to teach. Therefore, we re-reverse the dismisal of the charges of immorality".

On appeal, Commonwealth Court reversed because of the Secretary's improper re-evaluation of the credibility of witnesses.

Board of School Directors of Riverside Beaver School District v. Barton Howe, III, 389 A.2d 1214, 137 Pa. Cmwlth. Ct. 241 (1978) In Howe, Judge Disalle speaking for the Court said;

> "the problem with Howe's contention that the Secretary concluded solely as a matter of law that his conduct did not amount to immorality, is that at no point in his opinion does the Secretary say this". Id. at 249.

In the instant case the Secretary has so stated as follows:

> In this opinion we conclude that the teacher's conduct did not amount to immorality".

The Secretary of Education has decided that "this conduct did not amount to immorality as a matter of law".

Judge DiSalle and hence Commonwealth

Court, has implicitly sanctioned the decisions of the Secretary if only he (secretary) will say so as a matter of law. The Secretary has so stated. It is clear therefore that the instant decision is not in accord with present or past decisions of Commonwealth Court and should be reversed.

CONCLUSION

For the foregoing reasons, the public interest requires, it is respectfully submitted, that the petition for writ of certiorari should be granted.

Respectfully submitted,

Joseph M. Ludwig

JOSEPH M. LUDWIG

Attorney for Petitioner

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Carl Rice, Esq.
Prothonotary

801 City-County Building
Pittsburgh, PA
15219

Irma T. Gardner
Deputy Prothonotary

April 21, 1983

Joseph M. Ludwig, Esquire
Ludwig andAchman
312 Frick Building
Pittsburgh, PA 15219

In Re: Bethel Park School District v. Krall
No. 222 W.D. Allocatur Docket, 1982

Dear Mr. Ludwig:

This is to advise you that your Petition for Allowance of Appeal in the above-captioned matter was denied by the Court on April 19, 1983.

Very truly yours,

s/ Carl Rice

Prothonotary

CR:erv
cc: A. Bruce Bowden, Esquire
57th Floor, 600 Grant Street
Pittsburgh, PA 15219

Honorable David W. Craig
Commonwealth Court of Pa.
622 South Office Building
Harrisburg, PA 17121

BETHEL PARK SCHOOL DISTRICT, Petitioner	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
v.	:	
BETTE T. KRALL, Respondent	:	No. 3236 C. D. 1981

O R D E R

NOW, July 28, 1982, having considered respondent's application for reargument and petitioner's response thereto, said application is hereby denied.

BY THE COURT:

s/
Genevieve Blatt, J.

Certified from the Record
July 29, 1982

Francis C. Barbush
Chief Clerk

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BETHEL PARK SCHOOL DISTRICT,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 3236 C.D. 1981
BETTE T. KRALL,	:	
	:	
Respondent	:	

BEFORE: HONORABLE THEODORE O. ROGERS, Judge
HONORABLE GENEVIEVE BLATT, Judge
HONORABLE DAVID W. CRAIG, Judge

ARGUED: May 3, 1982

OPINION BY JUDGE CRAIG

FILED: June 8, 1982

The Bethel Park School District here appeals an order of the Secretary of Education sustaining the appeal of Bette T. Krall, a professional employee, who was dismissed by the district for conduct considered immoral under Section 1122 of the Public School Code.[1]

The facts of the incident which resulted in Mrs. Krall's dismissal are not in dispute. Mrs. Krall had been a tenured professional employee of the district since 1969, and was also an elected director of another school district in which she resides. In that latter capacity, Mrs. Krall wished to attend a conference in New Orleans, Louisiana, on Frebruary 14 and 15, 1979. Having previously requested and been refused paid personal time off to attend conferences unrelated to her work in Bethel Park, Mrs. Krall did not request personal time off to attend this conference; instead, she simply informed her

principal's secretary that she would be unavailable to perform her duties on the subject dates.

After attending the conference and returning to work, Mrs. Krall submitted a report of excused absence for February 14 and 15, 1979, listing illness as the reason for her absence. Shortly thereafter, Mrs. Krall submitted a statement from her physician indicating that she was ill on the subject dates. This statement was based on misrepresented information received from Mrs. Krall's husband without the benefit of an actual physical examination. Upon learning of the misrepresentation, Mrs. Krall's physician contacted the school district to retract his report.

Subsequently, following a hearing , the board dismissed Mrs. Krall, determining that her conduct amounted to immorality under the Code. Mrs. Krall appealed her dismissal

to the Secretary of Education, and a hearing was held on October 3, 1979. Two years later, on November 30, 1981, the Secretary of Education sustained Mrs. Krall's appeal, concluding that she did not act in an ammoral manner. This appeal by the board ensued.[2]

Where, as here, the Secretary did not take additional testimony,[3] his scope of review is limited to a determination of (1) whether there was substantial evidence to support the board's action and (2) whether, as a matter of law, the public employee's conduct constituted a violation of the school code. Strinich v. Clairton School District, 494 Pa. 297, 431 A.2d 267 (1981); Langley v. Uniontown Area School District, 28 Pa. Commonwealth Ct. 69, 72, 367 A.2d 736, 737, 738 (1977).[4] Thus, the issue here is whether Mrs. Krall's conduct constituted immorality as a matter of law. See Landi v. West Chester Area School District, 23 Pa. Commonwealth Ct. 586, 590, 353 A.2d 895,

897 (1976).[5]

Our Supreme Court, in Horosko v. Mt. Pleasant Township School District, 335 Pa. 369, 372, 6 A.2d 866, 868, cert. denied, 308 U. S. 553, 60 S. Court 101, 84 L. Ed. 465 (1939), defined "immorality" in Section 1122 of the Code as:

> A course of conduct as offends the morals of the community and is a bad example to the youth whose ideals of teachers is supposed to foster and elevate.

Moreover, questions of morality are not limited to sexual conduct, but may include lying. See Appeal of Flannery, 406 Pa. 515, 178 A.2d 751 (1962)

The determination of community standards is made by the school board, and thus a finding of the board that a professional employee was guilty of offending the moral standards of the community by his actions will not be disturbed on appeal when

supported by substantial evidence. Penn-Delco School District v. Urso, 33 Pa. Commonwealth Ct. 501, 382 A.2d 162 (1978). Such substantial evidence necessary to justify dismissal is determined by whether a reasonable person acting reasonably might have reached the same decision as the board. Id.

Although Mrs. Krall's unexcused absences might also have been considered in the context of "persistent willful misconduct,"[6] at least her misrepresentations are properly the subject of an immorality charge. Given our limited scope of review, we cannot say that a reasonable person might not have reached the same decision as the board.

Accordingly, we reverse.

s/
David W. Craig, Judge

BETHEL PARK SCHOOL DISTRICT, Petitioner	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
v.	:	
BETTE T. KRALL, Respondent	:	NO. 3236 C.D. 1981

O R D E R

NOW, June 8, 1982, the order of the Secretary of Education, dated November 30, 1981, No. 9-79, is hereby vacated, and the decision of the Bethel Park School District, Allegheny County, terminating the contract of Bette T. Krall is hereby reinstated.

s/
DAVID W. CRAIG, Judge

Certified From the Record
June 8, 1982

Francis C. Barbush
Chief Clerk

FOOTNOTES

1. Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §11-1122, which provides:

> The only valid causes for termination of a contract heretofore or hereafter entered into with a professional employee shall be immorality, ... or ... persistent and wilful violation of the school laws of this Commonwealth on the part of the professional employee ....

2. The board's petition for review questioned the Secretary's decision in regard to both his ruling on the question of immorality and his ruling on the question of persistent and willful violation of the school rules. However, counsel

for the school board stated before the hearing examiner that the decision to terminate Mrs. Krall was made solely on the issue of immorality. Thus the only issue before this court is that of Mrs. Krall's "immorality" under the Code.

3. Mrs. Krall contends that the Secretary improperly refused to take additional testimony. However, the Code explicitly states that the Secretary "may hear and consider such additional testimony as he may deem advisable to enable him to make a proper order." 24 P.S. §11-1131. See Clairton School District v. Strinich, 50 Pa. Commonwealth Ct. 389, 391, 392, 413 A.2d 26, 28 (1980), aff'd. 494 Pa. 297, 431 A.2d 267 (1981)

4. In Strinich, our Supreme Court clarified the standard of scope of review in matters involving the Secretary of Education:

> To the extent that additional testimony is taken, the Secretary may make additional findings of fact. If no such additional testimony is taken, however, the Secretary's review is limited to traditional appellate review. Strinich, 494 Pa. at 302, 431 A.2d at 269, n.3.

5. In Landi, Judge Rogers indicated that whether conduct constituted "cruelty" (a Section 1122 classification) was a matter of law.

6. See Lucciola v. Secretary of Education, 25 Pa. Commonwealth Ct. 419, 360 A.2d 310 (1976).

No. 83-160

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

BETTE T. KRALL,

Petitioner,

v.

THE BETHEL PARK SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT
OF PENNSYLVANIA

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

A. Bruce Bowden, Esquire
Buchanan Ingersoll
Professional Corporation
57th Floor - 600 Grant St.
Pittsburgh, PA 15219
(412) 562-8844
Counsel of Record for
Respondent

Of Counsel:

John R. Johnson, Esquire
Buchanan Ingersoll
Professional Corporation
57th Floor - 600 Grant St.
Pittsburgh, PA 15219
(412) 562-8819

Attorneys for Respondent

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether a Petition for Writ of Certiorari should be denied where the Petitioner failed to present her federal questions to the state courts in the manner required by their reasonable rules of procedure.

2. Whether a Petition for Writ of Certiorari should be denied where the Petitioner failed to file a timely Petition for Allowance of Appeal with the Supreme Court of Pennsylvania.

3. Whether the Petition for Writ of Certiorari should be denied where Petitioner's failure to follow the state court's rules of procedure constituted an adequate and independent state ground for the disposition of her case.

4. Whether the Petition for Writ of Certiorari should be denied

where it is frivolous and entirely devoid of merit and fails to raise any special or important federal questions for the Court's review.

5. Whether the power of school boards to determine, subject to administrative and judicial review, the community standards to be used in a teacher termination case constitutes a violation of the Fourteenth Amendment to the Constitution of the United States.

6. Whether the Secretary of Education's discretion to decide if it is necessary to take additional testimony on appeal of a teacher termination case inherently violates the teacher's rights under the Fourteenth Amendment to the Constitution of the United States.

7. Whether Commonwealth Court correctly ruled, as a matter of

Pennsylvania law, that the proper scope of review of the Secretary of Education in a teacher termination case is to determine if the school board properly applied the appropriate legal standard and if the board's decision was supported by substantial evidence on the record.

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STATUTES AND RULES

Judicial Code

Pennsylvania Public School Code of 1949 [Pa.Stat.Ann.tit. 24, §1-101 et seq. (Purdon)]

COUNTERSTATEMENT OF JURISDICTION

Petitioner asserts jurisdiction in this Court under 28 U.S.C. §1254(1). Section 1254 is applicable only to cases arising out of the federal courts of appeals. The instant case has heretofore proceeded exclusively in the state court system of the Commonwealth of Pennsylvania.

For the purposes of this Brief, Respondent has assumed that Petitioner meant to assert jurisdiction under 28 U.S.C. §1257(3). Jurisdiction does not lie in this Court under §1257(3), however, because Petitioner failed to properly "draw into question" or "specially set up or claim" in the state courts the Constitutional violations asserted in her Petition for Writ of Certiorari. Respondent's argument in

this regard is set forth more fully in the Argument section of this Brief.

COUNTERSTATEMENT OF THE CASE

A. Introduction

Petitioner's Statement of the Case is essentially correct prior to the last paragraph thereof, and to that extent is not disputed. Indeed, the greatest portion of Petitioner's Statement has been taken practically verbatim from Judge Craig's Opinion for the Commonwealth Court of Pennsylvania in this case.

The last paragraph of Petitioner's Statement is, however, incorrect. It provides:

> Bette T. Krall having prevailed before the Secretary of Education first raised Consitutional [sic]

> issues before the Commonwealth Court of Pennsylvania which was the court of first instance to hear the matter.

To correct that misstatement, Respondent offers the following Counterstatement in substitution of that paragraph and in addition to Petitioner's Statement of the Case. These facts were required to be included in the Petition for Writ of Certiorari by Sup.Ct.R. 21.1(h), but were not.

B. Counterstatement of the Case

The Decision of the Secretary of Education of the Commonwealth of Pennsylvania (hereinafter, the "Secretary"), which overturned the Decision of the Bethel Park School District (herein referred to as the "School District" or the "Respondent") to terminate Bette T. Krall (herein

referred to as "Mrs. Krall" or the "Petitioner"), was rendered on November 30, 1981. The School District filed a timely Petition for Review in the Commonwealth Court of Pennsylvania.

The School District's Petition for Review asserted that the Secretary had exceeded the scope of his review and had erroneously ruled that Mrs. Krall's conduct did not constitute "immorality" under the relevant statutory and case law.

A cross appeal by the Petitioner, if any, was required by Pa. R.A.P. 903(b) to be filed with the Commonwealth Court no later than January 13, 1982. No cross appeal was filed by Petitioner on that date or thereafter.

The School District's Brief in Commonwealth Court was timely filed,

and addressed the issues which had been raised in its Petition for Review. Mrs. Krall's Brief in Response, however, raised for the first time the issue of whether the Secretary had improperly refused to permit her to introduce evidence of predisposition on the part of a School Board member and discrimination by the School Board as a whole in that other teachers guilty of the same conduct had not been terminated. Mrs. Krall's Brief did not assert any violation of the Constitution or statutes of the United States nor did it cite to those laws.

The School District requested and was granted the right to file a Reply Brief, which pointed out that Mrs. Krall had not raised her discrimination allegations with the Secretary and that

her claims of predisposition and discrimination had not been placed before the court on appeal or cross appeal as required by Pa.R.A.P. 903(b).

Commonwealth Court's Decision in this case reversed the Decision of the Secretary. The court did not rule on any issues of federal statutory or Constitutional concern because none had been placed before it.

After losing her case in Commonwealth Court, Mrs. Krall's Application for Reargument claimed, for the first time, a violation of the Federal Constitutional guarantees of due process and equal protection. The School District responded that those Constitutional issues were not properly before the court because they had not been raised at any prior point in the

proceedings. The Application for Reargument was duly denied on July 28, 1982.

Mrs. Krall subsequently filed an untimely Petition for Allowance of Appeal in the Supreme Court of Pennsylvania. Pa.R.A.P. 1113(a)(2) required that she file her Petition no later than August 9, 1982 -- sixty days after entry of the Order sought to be reviewed. It was not filed until August 26, 1982. The Petition for Allowance of Appeal was denied on April 19, 1983.

SUMMARY OF ARGUMENT

A. This Court has not been presented with a substantial federal question because Petitioner's Federal Constitutional claims were not presented to the state courts in a timely and proper manner. She failed to preserve

her Federal Constitutional claims in Commonwealth Court when she did not file a cross appeal based on those issues. She also failed to file a timely Petition for Allowance of appeal in the Pennsylvania Supreme Court. As a result, neither state court ruled on the Federal Constitutional issues Mrs. Krall has raised in her Petition. Jurisdiction will not lie in this Court pursuant to 28 U.S.C. §1257(3) where, as here, the Petitioner has not presented any federal issues which were properly raised and decided by the state courts.

B. Petitioner's failure to raise by cross appeal her Federal Constitutional claims in Commonwealth Court and her failure to file a timely Petition for Allowance of Appeal in the Pennsylvania Supreme Court constitute

adequate and independent state grounds for the judgments of those courts.

C. Petitioner's asserted reasons for requesting the Writ of Certiorari are completely insubstantial and devoid of merit, and do not warrant this Court's exercise of its discretionary power of review.

ARGUMENT

A. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR LACK OF JURISDICTION BECAUSE PETITIONER FAILED TO PROPERLY PRESENT ANY SUBSTANTIAL FEDERAL QUESTIONS TO THE STATE COURTS BELOW.

In order to have a Petition for Writ of Certiorari considered by this Court, it is essential that the Petitioner show that substantial federal questions were raised in and ruled upon

by the courts below. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969); Crowell v. Randell, 35 U.S. (10 Pet.) 368, 391 (1836). This is a jurisdictional requirement.

In this case, Petitioner did not submit any federal issues to the state courts in a proper and timely manner and the state courts did not decide any federal issues either for or against her. There is, therefore, no decision of a state court which draws into question the validity of a treaty or statute of the United States or which involves a specially set up or claimed federal title, right, privilege or immunity, the necessary predicate to this Court's jurisdiction under 28 U.S.C. §1257(3).

1. Petitioner Failed To Submit Any Substantial Federal Question To The Commonwealth Court Of Pennsylvania In A Proper Manner.

The Petition for Writ of Certiorari submitted in this case did not, as required by Sup.Ct.R. 21.1(h):

> specify the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari.

The reason for this omission is simple: The Petitioner did not raise her Federal

Constitutional issues in a timely and proper manner in the Commonwealth Court of Pennsylvania and, as a result, those claims were not decided by that Court.

Petitioner first raised her Federal Constitutional claims in her Application for Reargument before the Commonwealth Court; she had not previously raised those issues with the court in a cross appeal. Failure to place an issue before a Pennsylvania appellate court by appeal or cross appeal is a well-established basis for the court's refusal to rule on that issue. Pennsylvania Human Relations Commission v. Chester Housing Authority, 458 Pa. 67, 72 n.12, 327 A.2d 335, 338 n.12 (1974), cert. denied, 420 U.S. 974 (1975).

Moreover, Mrs. Krall's asser-

tion in her Application for Reargument that the School District had violated her Federal Constitutional rights was not reviewable by Commonwealth Court in any event, since those issues were not raised by her before the Secretary of Education. Pennsylvania law requires that Federal Constitutional issues be raised in the appropriate administrative proceedings in order to be reviewed by the state courts. Altman v. Ryan, 435 Pa. 401, 407, 257 A.2d 583, 585 (1969); Dunk v. Manufacturers Light and Heat Co., 52 Pa. Commonwealth Ct. 85, 87, 415 A.2d 919, 920 (1980).

Because Petitioner failed to raise her Federal Constitutional issues in Commonwealth Court in the manner required by Pennsylvania law, this Court lacks jurisdiction to hear her claims at

this point in the proceedings. Cardinale v. Louisiana, supra; Stembridge v. Georgia, 343 U.S. 541, 547 (1952).

2. Petitioner Failed To Assert Any Federal Questions To The Supreme Court of Pennsylvania In A Timely Manner.

Petitioner's Statement of the Case fails to mention that her Petition for Allowance of Appeal in the Supreme Court of Pennsylvania was untimely filed under Pa.R.A.P. 1113(a)(2). It was due in that court on August 9, 1982. It was not submitted until August 26, 1982. No petition or motion for an extension of time or to file out of time was submitted to that court by Petitioner, even after this defect was pointed out by the School District in its Motion to Quash

the Petition for Allowance of Appeal. The Pennsylvania Supreme Court denied Mrs. Krall's Petition for Allowance of Appeal on April 19, 1983, without comment.

It is axiomatic that the failure to submit a timely appeal in the state court bars consideration of the case in this Court. John v. Paullin, 231 U.S. 583, 585 (1913).

B. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE STATE COURT JUDGMENT RESTED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

It is settled law that this Court will not disturb the decision of a state court which is based upon adequate and independent state grounds. Michigan v. Long, ____ U.S. ____, 51 U.S.L.W. 5231 (July 6, 1983); and, Herb v.

Pitcairn, 324 U.S. 117 (1945). The adequate and independent state ground may be procedural, as well as substantive, so long as the procedural rule in question serves a legitimate state interest. Henry v. Mississippi, 379 U.S. 443, 447 (1965).

In this case, the adequate and independent state grounds for ruling against Petitioner were 1) her failure to file a cross appeal in Commonwealth Court, and 2) her failure to file a timely Petition for Allowance of Appeal in the Pennsylvania Supreme Court. That such grounds are adequate and independent cannot be disputed. As stated by this Court in John v. Paullin, 231 U.S. at 585:

> Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts,

> the mode and time of invoking that jurisdiction and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. (Emphasis added.)

The fact that the Pennsylvania Supreme Court denied Mrs. Krall's Petition for Allowance of Appeal and that Commonwealth Court denied her Petition for Reargument without any comment regarding those procedural deficiencies is immaterial. The silence of a state court in such circumstances is presumed to result from the procedural deficiencies. Street v. New York, 394 U.S. 576, 582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-07 (1945).

It is undeniable that the state procedural rules in question serve a legitimate state interest. This Court

also has rules which provide that 1) issues not raised in the Petition for a Writ of Certiorari must be raised in a cross-petition in order to be heard by the Court, and 2) untimely Petitions for a Writ of Certiorari will not be heard by the Court. Sup.Ct.R. 19.5, 34.1(a) and 20.3.

This Court should, therefore, dismiss the Petition for Writ of Certiorari as frivolous since there were adequate and independent state grounds to rule against Petitioner.

C. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER HAS FAILED TO RAISE ANY FEDERAL ISSUES OF SUBSTANTIAL IMPORTANCE WHICH WOULD ENCOURAGE THE COURT TO EXERCISE ITS DISCRETIONARY POWER TO REVIEW THIS CASE.

The Rules of this Court provide that a writ of certiorari "will be

granted only when there are special and important reasons therefor." Sup.Ct.R. 17.1. Among the reasons which weigh in favor of granting the writ are 1) the existence of conflicting decisions between state and federal courts or between state courts of the last resort and 2) that the state court has ruled on "an important question of federal law which has not been, but should be, settled by this Court ...." Sup.Ct.R. 17.1(b) and (c).

In the instant case, Petitioner has basically ignored Rule 17.1 and has instead continually asserted the magic words "due process" and "equal protection." She has essentially set forth five reasons supporting her Petition:

1. The Commonwealth Court's deferral to the School District's

assessment of "community standards" is inherently void for vagueness in violation of Petitioner's rights to due process and equal protection of the law;

2. That the Commonwealth Court's decision to leave the severity of punishment in cases of immorality up to the School District is a violation of Petitioner's right to due process of law;

3. That the Secretary of Education's decision not to take additional testimony on appeal with regard to the issues of predisposition and discrimination violates Petitioner's right to due process of law;

4. That the Commonwealth Court's enforcement of the established standard of review in teacher tenure cases was arbitrary and capricious and deprives her of due process under color of state law; and

5. That the Commonwealth Court's decision in this case is inconsistent with its prior decisions in similar cases.

Quite clearly, none of these reasons fall within the "conflicts" por-

tion of Rule 17.1. Sup.Ct.R. 17.1(b). Respondent would argue that they also fail to set forth important federal law questions which should be decided by this Court. Sup.Ct.R. 17.1(c).

1. This Court Has Already Determined That The Use Of "Community Standards" Is An Acceptable Means Of Deciding Individual Cases.

The Supreme Court of Pennsylvania has held that the term "immorality," as used in §1122 of Pennsylvania's Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, 24 P.S. §11-1122, means:

> A course of conduct as offends the morals of the community and is a bad example to the youth whose ideals a teacher is supposed to foster and elevate.

Horosko v. Mount Pleasant Township School District, 335 Pa. 369, 372, 6

A.2d 866, 868, cert. denied, 308 U.S. 553 (1939); See also, Penn-Delco School District v. Urso, 33 Pa. Commonwealth Ct. 501, 510, 382 A.2d 162, 167 (1978).

On appeal to the Secretary of Education and the state appellate courts, the standard of review of the School District's termination decision where "immorality" was the basis for terminating a tenured teacher's employment is whether the decision was correct as a matter of law and whether there was substantial evidence to support the School District's determination. Langley v. Uniontown Area School District, 28 Pa. Commonwealth Ct. 69, 72, 367 A.2d 736, 737-38 (1977). In other words, might a reasonable man, acting reasonably, reach the same decision? Penn-Delco School District

v. Urso, 33 Pa. Commonwealth Ct. at 511, 382 A.2d at 167.

Thus, Pennsylvania law provides a "community standards" basis for determining immorality under the Public School Code, with provision for administrative and judicial review using the "substantial evidence," "legal correctness" and "reasonableness" standards. So stated, Pennsylvania's procedure for determining immorality under its Public School Code is very similar to standards established by this Court for the determination of obscenity in Miller v. California, 413 U.S. 15 (1973): i.e., "whether 'the average person, applying contemporary community standards' would find that the work, taken on a whole, appeals to the prurient interest ...." Id., at 24. This Court further stated

in that case that "[t]he mere fact that juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged." Id., at 26 n.9.

Since this Court has already determined that the application of "community standards" in an individual case, properly policed by the courts, does not constitute an infringement of constitutional rights, Respondent would respectfully submit that Petitioner's first-cited reason is insufficient to establish a need for this Court's review.

2. Petitioner's Argument That Leaving The Severity Of Punishment To The School District's Discretion Is A Due Process Violation Is Frivolous And Devoid Of Merit.

Respondent is at a loss to

determine why Petitioner believes that discretion of the School District to determine the severity of the punishment in a teacher termination case is a violation of her due process rights under the Fourteenth Amendment to the Constitution of the United States. Someone has to decide in the first instance what the punishment will be. In Pennsylvania, that role has been delegated to the local School District, subject to administrative and judicial review for sufficiency of evidence, legality and reasonableness. Penn-Delco School District v. Urso, 33 Pa. Commonwealth Ct. 501, 511, 382 A.2d 162, 167 (1978).

The only case authority cited by Petitioner in support of her argument in this regard is Fisher v. Snyder, 476

F.2d 375 (8th Cir. 1973). That case involved a school teacher who had been terminated pursuant to the Nebraska statutory equivalent of "immorality" in the Pennsylvania Public School Code. In Fisher, the Eighth Circuit ruled that the decision of the Nebraska School District in the circumstances of that case was arbitrary and capricious and therefore violated the teacher's right to due process of law under the Fourteenth Amendment. Id., at 378.

Without arguing the merits of Fisher, it is immediately apparent that it is irrelevant to the instant Petition. While the Eighth Circuit ruled that the teacher's rights had been violated by the arbitrary and capricious decision of the school board, it did not rule that the Nebraska statute under

which the school board made its decision was unconstitutional.

Moreover, the lack of due process in the Fisher case was based on the complete lack of proof of misconduct on the part of the teacher. The school board's decision was admittedly based only upon inference -- not fact. Id., at 377. In the instant case, on the other hand, Commonwealth Court found that there was substantial evidence on the record to support the School District's decision.

3. The Secretary of Education's Decision Not To Take Additional Testimony As An Exercise Of His Administrative Discretion Is Not An Important Issue Which Warrants This Court's Review.

In Pennsylvania's scheme of teacher tenure appeals, the principal hearing occurs before the Board of the

School District in which the teacher works. Appeals from their decisions are first directed to the Secretary of Education. Public School Code of 1949, Act of March 10, 1949, P.L. 30, as amended, §1131, 24 P.S. §11-1131. The Secretary has discretionary power to decide whether or not additional testimony is needed on appeal. Id. His decision will not be overturned by the courts unless he has abused his discretionary powers. Clairton School District v. Strinich, 50 Pa. Commonwealth Ct. 389, 413 A.2d 26 (1980), aff'd, 494 Pa. 297, 431 A.2d 267 (1981), cert. denied, 456 U.S. 982 (1982). Petitioner has never shown any basis upon which it may be said that the Secretary abused his discretion in this case.

Respondent would note,

moreover, that the cases cited in the Petition simply do not support Petitioner's argument that the Secretary of Education's failure to refuse to take additional testimony on appeal was in violation of her due process rights. None of those cases deal with due process. Yick Wo v. Hopkins, 118 U.S. 356 (1886) was decided on equal protection grounds. Id., at 373-74. Lane v. Wilson, 307 U.S. 268 (1939) was decided on the basis of the Fifteenth Amendment of the Constitution of the United States. Id., at 275-77. Hanover Township Federation of Teachers v. Hanover Community School Corporation, 318 F.Supp. 757 (N.D. Ind. 1970), aff'd., 457 F.2d 456 (7th Cir. 1972) was decided on the basis of the First Amendment right to freedom of association. 318 F.Supp. at 763.

4. Petitioner's Argument That The Commonwealth Court Decision In This Case Was Arbitrary And Capricious And Deprived Her Of Her Due Process Rights Is Clearly Specious And Does Not Serve As A Valid Basis For Granting Her Petition for Writ of Certiorari.

Petitioner's reason "III" for her Petition for a Writ of Certiorari states in part:

> By correctly stating the issue as a question of law and then deciding it as a question of fact, Commonwealth Court has acted arbitrarily and has departed from the accepted and usual course of judicial decision making so as to call for an exercise of the power of supervision of the Supreme Court.

(Petition for Writ of Certiorari, at 14.)

Respondent is, once again, at a total loss to see why this Court would wish to exercise "supervisory powers" over the manner in which opi-

nions are written in state courts. If this can be the basis for asserting violations of due process rights, this Court will undoubtedly be inundated with Petitions requesting certiorari on the basis of real or perceived flaws in judicial opinions.

The fact of the matter is that the court's Opinion does answer the "legal question" posed. Judge Craig stated in his Opinion:

> Thus, the issue here is whether Mrs. Krall's conduct constituted immorality as a matter of law. See, Landi v. West Chester Area School District, 23 Pa. Commonwealth Ct. 586, 590, 353 A.2d 895, 897 (1976).
>
> Our Supreme Court, in Horosko v. Mt. Pleasant Township School District, 335 Pa. 369, 372, 6 A.2d 866, 868, cert. denied, 308 U.S. 553, 60 S.Ct. 101, 84 L.Ed. 465 (1939), defined "immorality" in Section 1122 of the Code as:
>
> > A course of conduct as offends the morals of the

> community and is a bad example to the youth whose ideals teachers are supposed to foster and elevate.

Moreover, questions of morality are not limited to sexual conduct, but may include lying. See, Appeal of Flannery, 406 Pa. 515, 178 A.2d 751 (1962).

> The determination of community standards is made by the school board, and thus a finding of the board that a professional employee was guilty of offending the moral standards of the community by his actions will not be disturbed on appeal when supported by substantial evidence. Penn-Delco School District v. Urso, 33 Pa. Commonwealth Ct. 501, 382 A.2d 162 (1978). Such substantial evidence necessary to justify dismissal is determined by whether a reasonable person acting reasonably might have reached the same decision as the board. Id.

Bethel Park School District v. Krall, 67 Pa. Commonwealth Ct. 143, 146-47, 445 A.2d 1377, 1378-79 (1982), appeal denied, ____ Pa. ____, ____ A.2d ____, (1983).

In other words, the question before the court was whether Mrs. Krall's conduct constituted immorality as a matter of law. The legal standard, established in Horosko, was that of the "community" as determined by the school board. Its decision is subject to review by the Secretary and the state courts only with regard to whether the proper legal standard -- community standards -- was applied and whether there was substantial evidence to support the board's decision. In the instant case, however, the Secretary attempted to overrule the school board's determination as to community standards and substitute his own judgment therefor. That is why his decision was overturned by Commonwealth Court.

The basic thrust of

Petitioner's argument in this regard is that Judge Craig's Opinion was not presented in a logical manner. Respondent would contend that the Opinion is emminently logical and fully answers the legal question raised. Even if the Opinion had failed logically, however, that would not be a valid basis for this Court to issue a Writ of Certiorari. It is axiomatic that this Court reviews judgments -- it does not revise opinions. Herb v. Pitcairn, 324 U.S. at 126.

5. Inconsistency Between Decisions Of Different Panels Of The Same State Court, Even If True, Is An Insufficient Reason For This Court To Grant The Instant Petition.

Petitioner has asserted, as a reason for this Court to grant her Petition, that the Decision of Commonwealth Court in the instant case

was inconsistent with a previous decision of the court in Appeal of Barton Howe III, 37 Pa. Commonwealth Ct. 241, 389 A.2d 1214 (1978). In point of fact, however, the court in Howe never reached the issue of "immorality," but instead overturned the Secretary of Education's decision on the basis that he had exceeded his authority by re-evaluating the credibility of witnesses who testified before the school board in that case.

Even assuming, arguendo, however, that Petitioner is correct in her assertion that the two decisions conflict, Respondent would assert with confidence that no federal question is raised thereby. This Court does not and should not concern itself with differences of opinion among the courts of a particular

state concerning the interpretation of their own state's law.

CONCLUSION

For each and all of the foregoing reasons, Respondent respectfully requests that the Court deny Mrs. Krall's Petition for Writ of Certiorari as completely and utterly frivolous and devoid of merit, and that an award of appropriate damages be made to Respondent pursuant to Sup.Ct.R. 49.2.

Respectfully submitted,

By _____
A. Bruce Bowden, Esq.

Counsel of Record for Respondent

Of Counsel:

By _____
John R. Johnson, Esq.

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, A. Bruce Bowden, hereby certify that I have, this 18th day of August, 1983, served three copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari upon the Petitioner by first class mail, postage prepaid, addressed to her counsel of record as set forth below:

Joseph M. Ludwig, Esquire
Ludwig & Achman
Attorneys for Petitioner
312 Frick Building
Pittsburgh, PA 15219

A. Bruce Bowden

No. 83-160

SUPREME COURT OF THE UNITED STATES

October Term 1983

BETTE T. KRALL,

Petitioner

v.

THE BETHEL PARK SCHOOL DISTRICT,

Respondent.

REPLY BRIEF OF PETITIONER

JOSEPH M. LUDWIG
LUDWIG & ACHMAN
Attorneys for Petitioner
312 Frick Building
Pittsburgh, PA 15219
(412) 232-3500

REPLY-STATEMENT OF QUESTIONS PRESENTED

1. Did Petitioner:

   (A) Present federal questions in state court?

   (B) File a timely Petition for Allowance of Appeal in state court?

2. Does a "community standard" rule for termination of employment withstand Constitutional scrutiny?

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REPLY TO RESPONDENTS COUNTER-STATEMENT

Bette T. Krall has been fired, denied her life's work, her livelihood and has been held up to ridicule within the community. Her attempt to seek this Court's help has been termed frivolous, without merit and further met with issues the effect of which would divert us from considering the Constitutional challenge involved.

Two matters require the Court's attention of a factual nature.

I. Following her dismissal on March 12, 1979 Bette T. Krall filed a timely appeal to the Secretary of Education of the Commonwealth of Pennsylvania. Paragraph 6 of her appeal raised Constitutional issues as follows:

"6. Appellant believes and avers that her discharge as a professional employee was illegal and unconstitutional and in support thereof avers as follows:

c. The hearing and adjudication violated Appellant's right to due process of law." Emphasis ours.

Respondent's contention of when federal questions were raised are just false as shown clearly by the record and as quoted above.

II. Commonwealth Court on June 3, 1982 reversed the Secretary of Education, thus firing Mrs. Krall. Following the filing of a timely Petition for Reconsideration the Court denied the same on July 28, 1982. A Petition for Allowance of Appeal was filed timely on

August 26, 1982. Pennsylvania Rules of Appellate Procedure 1113(a) requires an appeal to be made within thirty (30) days. Respondents have not read the rule.

III. The Respondent's lengthy brief is in violation of Rule 22.2 and should not have been accepted by the Clerk.

ARGUMENT

I. Were the federal questions preserved and was an appeal timely made?

Petitioners position is that the challenge to the Constitution must be raised at the earliest possible moment. See Konigsberg v. State Bar of California, 77 S. Ct. 722, 353 U.S. 252; Huddleston v. Dwyer, 64 S. Ct. 1015, 322 U. S. 232. Had Bette T. Krall not raised the Constitution in her Appeal to the Secretary of Education the right may nevertheless have been preserved since she prevailed before the Secretary. It would be arguable whether or not the appeal was preserved if it was first raised in Commonwealth Court.

Of course, her having raised the Constitution before the Secretary of Education cuts off any further debate. Respondent's argument is obviously without having familiarized it with the record. We would ask Respondent so acknowledge.

Respondent further argues that Petitioner's Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was due no later than August 9, 1982 and filed on August 26, 1982 and is thus untimely. Respondent forgets or ignores (its brief does not indicate) that Commonwealth Court was asked to reconsider and following this denial a Petition for Allowance of Appeal to the Supreme Court was filed on August 26, 1982.

If we ignore this Petition for Reconsideration filed with Commonwealth Court the Respondent's position would have merit - simply ignoring this matter does not. The Petition for Reconsideration was denied on July 28, 1982. A Petition for Allowance of Appeal was timely filed on August 26, 1982. Pennsylvania Rules of Appellate Procedure 1113(a) requires an appeal to be filed within thirty (30) days of the July 28, 1982 order.

II. Does a "community standard" rule for termination of employment stand up to the Constitution?

The "community standards" rule as being one of no law was raised in the original Petition before this Court. The Respondent has analogized the obscenity cases as being

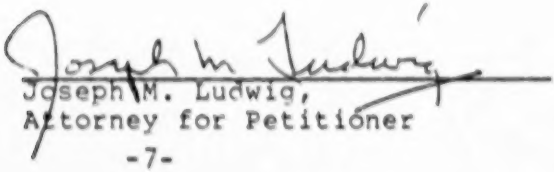
applicable. We submit that they are not; that considerations for termination of employment are vastly different; that the criteria that govern employment in schools is just not the same as that which governs porn shops. We ask this Court to grant the Writ to consider these criteria.

CONCLUSION

For the reasons herein stated and for the reasons stated in the original Petition, it is respectfully submitted that the public interest requires that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LUDWIG & ACHMAN



Joseph M. Ludwig,
Attorney for Petitioner